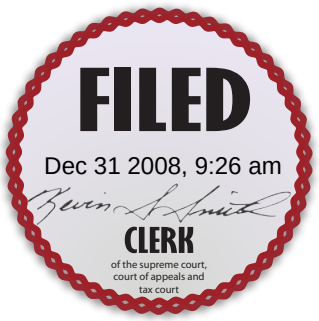

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IN THE
COURT OF APPEALS OF INDIANA

RICHARH TYSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A05-0805-CR-260
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0709-FA-171

December 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Richarh Tyson appeals from his conviction for Dealing in Cocaine, as a Class A felony, following a jury trial. He presents the following issues for our review:

1. Whether the trial court erred when it denied his motion to discharge based upon Criminal Rule 4(C).

2. Whether the trial court abused its discretion when it denied his motion to correct error based upon a defect in the verdict form.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 18, 2005, Grant County police officers monitored a drug buy between a confidential informant ("CI") and Tyson. After the CI bought $250 worth of cocaine from Tyson, police arrested Tyson. The State charged Tyson with dealing in cocaine in an amount over three grams, a Class A felony.

On September 13, 2007, Tyson filed a motion for discharge pursuant to Criminal Rule 4(C). Following a hearing, the trial court denied that motion. At trial, the verdict form misidentified the charged offense as possession of cocaine with intent to deliver, but that defect was not discovered until after the jury had been dismissed. On November 13, Tyson filed a motion to set aside defective verdict. The trial court denied that motion and entered judgment of conviction for dealing in cocaine, as a Class A felony, and sentenced Tyson accordingly.[1] Tyson filed a motion to correct error, which the trial court denied. This appeal ensued.

[1] Tyson was also convicted of resisting law enforcement, but he does not appeal from that conviction.

DISCUSSION AND DECISION

Issue One: Motion for Discharge

Tyson first contends that the trial court erred when it denied his motion for discharge under Criminal Rule 4(C), which provides in relevant part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar.

Our review of a trial court's ruling on a Criminal Rule 4(C) motion is de novo. Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), trans. denied.

Tyson was held in pretrial detention for approximately twenty-seven months. In his motion for discharge, Tyson asserted that the State was chargeable for 397 days of that period. The State, however, argued that it was only chargeable with 217 days. Following a hearing on Tyson's motion for discharge, the trial court concluded that the October 9, 2007, trial date was "within the parameters established by Criminal Rule 4(C)." Appellant's App. at 277. In particular, the trial court rejected both Tyson's challenge to the trial court's congestion order of August 7, 2006, and his contention that the State should be charged with a delay after the trial court rejected Tyson's guilty plea. We address each of these issues in turn.

Congestion Order

Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. Alter v.

State, 860 N.E.2d 874, 877 (Ind. Ct. App. 2007). However, a defendant may overcome this presumption by demonstrating that the finding of congestion was factually or legally inaccurate. Id. Such proof establishes a prima facie case adequate for discharge unless the trial court sets forth an explanation for congestion. Id. If the trial court provides further findings which explain the congestion and justify the delay, the appellate court will give reasonable deference to the trial court's explanation. Id. The burden then shifts back to the defendant to establish that he is entitled to discharge by showing that the trial court was clearly erroneous. Id.

Here, Tyson claims that the trial court's August 7, 2006, congestion order is "fraudulent."[2] Brief of Appellant at 10. Tyson is correct that the trial court erred when, in its congestion order of August 7, 2006, it stated that a trial was scheduled for that date in State v. Burkes. In fact, Burkes had pleaded guilty more than one week prior to August 7. However, during the hearing on Tyson's motion for discharge, Deputy Prosecutor Rodney Faulk testified that despite Burkes' guilty plea, there were still at least three other trials scheduled on that date that had trial priority over Tyson's case. And Faulk testified that while no trial ended up being held on August 7, he would have prepared for each of those other three possible trials.[3]

[2] In support of that contention, Tyson asks that we take "judicial notice" of "evidence [from other criminal cases] to establish a pattern of fraudulent congestion orders with this particular [trial] judge and this particular [trial] court." Brief of Appellant at 11. We decline Tyson's invitation. Further, Tyson alleges that the congestion order was not actually entered on August 7, 2006, but was subsequently added to the CCS as subterfuge. To the contrary, the trial court's order is clearly dated August 7, 2006, file stamps notwithstanding. See Appellant's App. at 476-77.

[3] This court has held that a trial court has discretion to, sua sponte, enter a congestion order. Young v. State, 765 N.E.2d 673, 677 (Ind. Ct. App. 2002). And we have acknowledged that "[o]ften, several criminal trials will be scheduled on the same day and the State will not know until the day of trial

Further, in response to Tyson's assertion of fraud, the trial court, in its order denying Tyson's motion to correct error, stated:

> On August 7, the court entered a court congestion order identifying the case of State of Indiana v. Erivon Burkes as scheduled for trial ahead of this case. The Defendant tendered evidence at the hearing indicating that a guilty plea was taken in the Burkes case prior to August 7, 2006. The State submitted evidence establishing that six other cases were set for trial in Superior 2 on August 7, including three older cases than the present case, which cases would have had trial priority over this case. Based upon the evidence, the Court concludes that there was a misidentification of the case set for trial on that date by the Superior Court 2 staff. The case was reset for November 27, 2006[.]

Brief of Appellant at 37 (emphasis added). With that explanation, we give deference to the trial court's claim of congestion. See Alter, 860 N.E.2d at 877. Thus, the delay from August 7, 2006, until November 27, 2006, is not chargeable to the State.[4]

Guilty Plea

Next, Tyson contends that the trial court erred when it did not charge the State with a delay after the trial court rejected his guilty plea. On August 6, 2007, Tyson entered into a proposed plea agreement with the State, and the trial court set the matter for sentencing on August 27, 2007. At that hearing, the trial court rejected Tyson's guilty plea due to protestations of innocence he had made during an interview with the probation officer who prepared the presentence investigation report.[5] In particular, Tyson

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which cases will end in a plea agreement and which cases will proceed to trial." Id. Without evidence to the contrary, we have no reason to believe that that is not what occurred here.

[4] Even if that delay were chargeable to the State, however, there was no Criminal Rule 4(C) violation because of the delay chargeable to Tyson following the trial court's rejection of his guilty plea, as explained below.

[5] In a filing of Additional Authorities submitted to this court on December 12, Tyson cites Carter v. State, 739 N.E.2d 126, 128 n.2 (Ind. 2000), in asserting that his protestations of innocence to the

had stated that the charge was "bullshit" and that he "want[ed] the Judge to know that [the cocaine] was planted on [him] and they told [him] they were going to get [him] and they did." Transcript at 33.

The trial court exercised its wide discretion in rejecting Tyson's guilty plea, and the delay caused thereby is chargeable to Tyson. See Jennings v. State, 723 N.E.2d 970, 972 (Ind. Ct. App. 2000). It is well settled that the one-year time limit is extended where a delay is caused by the defendant's own action. See Cook v. State, 810 N.E.2d 1064, 1066 (Ind. 2004). His own conduct led to the court's rejection of the plea and he is, therefore, properly charged with the ensuing delay in setting the trial.[6]

Further, while Tyson is charged with the delay between August 6 (when the parties informed the trial court about the plea agreement) and August 27 (the date of the sentencing hearing), see Miller v. State, 650 N.E.2d 326, 329 (Ind. Ct. App. 1995), trans. denied, the delay from August 27 until September 5, 2007, resulted from the trial judge's recusal and transfer to a different trial court. That delay is not chargeable to the State. See State v. Goble, 717 N.E.2d 1268, 1272 (Ind. Ct. App. 1999) (holding delay from date of recusal to date of appointment of special judge tolled the running of the Criminal Rule 4(C) time period). In addition, Tyson's counsel withdrew his appearance, and the new

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probation officer should have had "no bearing on the validity of the plea[.]" Filing of Additional Authorities December 12, 2008. But in his Brief of Appellant, Tyson does not appeal from the trial court's rejection of his guilty plea. Further, Carter is an appeal from a denial of post-conviction relief. A trial court has wide discretion in accepting or rejecting a guilty plea. Jennings v. State, 723 N.E.2d 970, 972 (Ind. Ct. App. 2000). And a defendant does not have a right to have a guilty plea accepted. Id. Carter is inapposite to the issue of whether the delay caused by the trial court's rejection of Tyson's guilty plea should be charged to him.

[6] We reject Tyson's argument that the State should be charged with the delay because the State moved the trial court to reject the plea in light of his protestations of innocence. The trial court rejected the plea based upon Tyson's statements to the probation officer, and Tyson does not challenge that rejection for an abuse of discretion on appeal.

trial court appointed a public defender to represent Tyson.[7] The trial court set a new trial date, October 9, 2007. Thus, the delay from September 5 until October 9 is not chargeable to the State.

In sum, Tyson has not demonstrated that the trial court's calculation of time running under Criminal Rule 4(C) is incorrect. As the trial court stated:

> The time period between Defendant's arrest on August 19, 2005 and the first trial setting on November 28, 2005 is 101 days. The time period between November 28, 2005 and August 7, 2006 is unquestionably chargeable to the Defendant, as he requested two continuances therein. The time period between August 7, 2006 and April 16, 2007 (the trial setting after the State continuance) comprises 252 days. If, for purposes of argument, all of that time is charged to the State, including that encompassed by the congestion order, the total time chargeable to the State is 353 days—less than one year.
>
> * * *
>
> Defendant's actions, most notably his inconsistent statements to his probation officer following his plea of guilty, caused the delay between August 6, 2007 and October 9, 2007. After transfer of this case [following the recusal of the first trial judge], this Court promptly appointed new counsel for the Defendant, and set a trial date at the earliest possible occasion to accommodate both the Court's calendar and new counsel's ability to familiarize himself with the case and its issues.

Brief of Appellant at 40-41 (footnotes and emphases omitted).

Issue Two: Defective Verdict Form

Tyson contends that the trial court erred when it entered judgment of conviction for possession of cocaine with intent to deliver and sentence thereon when he was

[7] Tyson attempts to argue that he should not be charged with the delay that resulted from his attorney's withdrawal from the case, but Tyson ignores the effect of the trial judge's recusal from the case, which occurred first. Tyson has not demonstrated that he was improperly charged with the delay from September 5 until October 9.

charged with dealing in cocaine in an amount of three grams or more. Tyson claims that his due process rights were violated as a result of the error. We cannot agree.

Tyson concedes that the jury was properly instructed on the charged offense of dealing in cocaine in an amount of three grams or more, but points out that the error in the verdict form, misidentifying the offense as possession of cocaine with intent to deliver, means that he was convicted of the wrong offense. This court addressed a similar set of circumstances in Maynard v. State, 508 N.E.2d 1346 (Ind. Ct. App. 1987), trans. denied, where the defendant was charged with conspiracy to commit theft, but was convicted of theft.

In Maynard,

> Count Seven of the information filed against Maynard charged him with conspiracy to commit theft. However, during final instructions the trial court mistakenly stated that Count Seven invited conviction or acquittal for theft. During jury deliberations, Maynard objected to this instruction. The judge returned the jury to the courtroom and admonished them regarding the misinstruction on Count Seven. Despite this admonishment the jury returned a verdict on Count Seven finding Maynard guilty of theft. Thereafter, Maynard notified the trial judge of the incorrect verdict and filed a motion to set aside the verdict on Count Seven. Following a hearing, the trial court denied Maynard's motion.

Id. at 1350-51.

On appeal, this court set out the applicable rules of law. It is a denial of due process of law to convict an accused of a charge not made. Id. at 1351. Where instructions are given or a verdict is rendered on a particular offense which is not the same as the offense charged reversal is usually warranted. Id. When a trial court receives a defective verdict form from a jury, the trial court should send the jury back for more deliberations to correct the defect. Id. Specifically, it is the duty of the trial judge

to see that the verdict is in proper form and covers all the issues before discharging the jury. Id.

But in Maynard, we held:

> In the present case, the verdict on Count Seven was defective in convicting Maynard of a crime for which he was not charged. Count Seven specifically charged Maynard with conspiracy to commit theft but the jury rendered a verdict of guilty of theft. Often, the remedy in this type of situation has been to reverse the conviction and remand the cause for a new trial. This action is required whenever it appears that the defendant has been misled by the evidence introduced at trial or the issues joined under the information have not been determined.
>
> However, an erroneous judgment of conviction of this type does not always require reversal. "Where the defendant has not been misled and it is evident that the issues joined under the charging information have been determined, a simple correction of the judgment, rather than reversal, is the appropriate remedy." McFarland v. State, [179 Ind. App. 143, 384 N.E.2d 1104, 1109-10 (1979)]. In McFarland, the defendant was charged by information with the offenses of attempting to commit a felony (to-wit: robbery) while armed and assault with intent to kill. However, the verdict form indicated he was convicted of armed robbery and assault and battery. During jury instructions, the trial judge read the charging affidavit which alleged McFarland "did . . . attempt to take the value of FIVE DOLLARS AND NO CENTS ($5.00) in lawful money." Id. at [1110]. The instruction setting out the elements of the crime followed the language of the statute and used the words, "committed or attempted to commit," interchangeably. However, the verdict form only referred to the consummated crime of armed robbery leaving the jury with no alternative, if it used the suggested verdict forms, but to find McFarland "guilty of COMMISSION OF A FELONY WHILE ARMED, TO WIT: ROBBERY, as charged in the formal accusation," or else return a verdict of acquittal. Id. On appeal, this court noted that the finding of guilty at the very least determined the issues joined under the charge of attempted robbery. In addition, this court stated that McFarland could not have been misled in his defense since the State had not introduced evidence of criminal activity unrelated to the offense charged. Accordingly, the second district concluded that the judgment on the erroneous verdict did not require reversal, but could simply be corrected to conform with the charge of attempted armed robbery. Id. at [1110].
>
> In the present case, Maynard's erroneous conviction for theft on Count Seven does not require reversal. The charging information in Count Seven

> correctly set out the charge of conspiracy to commit theft. This information was read to the jury. The elements of conspiracy, as well as those of theft, were read to the jury during final instructions. Moreover, upon discovery that he had misinstructed the jury on Count Seven, the trial judge recalled the jury and admonished them[.]

Id. at 1351-52 (some citations omitted, emphases added).

Here, because the defect in the verdict form was not discovered until well after the jury had been discharged, the trial court did not admonish or poll the jury. Regardless, the record is clear that the State did not present evidence unrelated to the charged offense, which could have misled Tyson in his defense. In addition, the jury was properly instructed on the charged offense of dealing in cocaine in an amount over three grams. There was no confusion as to the charged offense until the verdict form misidentified the offense. We note that both the charged offense and the offense identified on the verdict form constitute the offense of "dealing in cocaine" under Indiana Code Section 35-48-4-1.[8] Despite the defective verdict, the trial court properly entered judgment of conviction as "Dealing in Cocaine—A Felony" and sentenced Tyson on "Dealing in Cocaine, a Class A felony." Appellant's App. at 397, 400. While we might find reversal warranted had the jury been improperly instructed, such is not the case here. Tyson has not demonstrated that the defective verdict form resulted in the denial of his right to due process.[9]

[8] The crime of dealing in cocaine occurs either when a person knowingly or intentionally manufactures, finances the manufacture of, delivers, or finances the delivery of cocaine; or possesses cocaine with intent to manufacture, finance the manufacture of, deliver, or finance the delivery of cocaine. And the offense is a Class A felony if the amount of the cocaine weighs three grams or more.

[9] Tyson attempts to analogize this case to Golladay v. State, 875 N.E.2d 389 (Ind. Ct. App. 2007), and Simmons v. State, 585 N.E.2d 1341 (Ind. Ct. App. 1992), but those cases did not involve

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.

defective verdict forms. Here, because the jury was properly instructed regarding the charged offense and only the verdict form misidentified the offense, those cases are inapposite.